

**BRIEF IN SUPPORT OF PETITION FOR REVIEW
ON WRIT OF CERTIORARI**

I.

INDEX and TABLE OF CASES—(See Index and Table at beginning of petition.)

II.

THE OPINION OF THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT OF WHICH REVIEW IS SOUGHT, IS REPORTED IN 132 F. (2d) 740.

III.

STATEMENT OF JURISDICTION (See statement as to jurisdiction in foregoing petition.)

IV.

STATEMENT OF CASE (See STATEMENT OF THE MATTER INVOLVED in foregoing petition.)

V.

SPECIFICATION OF ERROR—(In the foregoing petition under the caption QUESTIONS PRESENTED, the Errors of the Circuit Court of Appeals are set out. These errors as reflected by such questions presented are hereby assigned as errors in this brief.)

VI.

ARGUMENT—THE FOLLOWING STATEMENTS AND CONTENTIONS CONTAINED IN THE FOREGOING PETITION ARE SUPPORTED BY AUTHORITIES AS SHOWN:

(1)—THAT THIS PROCEEDING IS FOR CIVIL CONTEMPT—

N. L. R. B. v. Whittier Mills, 122 F. (2d) 725 (5th);

N. L. R. B. v. Hopwood Retting Co., 102 F. (2d) 302 (2nd);

N. L. R. B. v. Carlisle Lumber Company, 108 F. (2d) 188 (9th);

Gompers v. Buck Stove Company, 221 U. S. 418.

Examination as to the manner in which this case was styled in the Circuit Court and of the procedure followed whereby these petitioners (as respondents) were required to answer the allegations of the Labor Board petition, demonstrate that this is a civil contempt proceeding.

(2)—THAT THE ADMITTED PARTS OF THE PETITION ARE CONSIDERED AS TRUE, AND THAT AS TO THOSE DENIED, THE ALLEGATIONS OF THE ANSWER ARE TAKEN AS TRUE:

Waterman S. S. Corporation, v N. L. R. B., 119 F. (2d) 760 (5th).

- (3)—THAT CONTEMPTUOUS CONDUCT SHOULD BE ESTABLISHED BY CLEAR AND PREPONDERATING EVIDENCE:

City of Campbell v. Arkansas-Missouri Power Co., 65 F. (2d) 425 (8th);
17 C. J. S. page 110.

- (4)—THAT A CIRCUIT COURT IS WITHOUT AUTHORITY TO PUNISH AS CONTEMPTUOUS, ALLEGED UNLAWFUL PRACTICES WHICH WERE NOT RELATED TO OR SIMILAR TO THE PRACTICES WHICH ITS PRIOR DECREE SOUGHT TO REMEDY:

N. L. R. B. v. Express Publishing Company,
321 U. S. 426.

This case has been discussed and quoted from in the foregoing petition and it is unnecessary to present additional extensive argument here. We wish merely to say that unless the general cease and desist order (embodying the contents of Section 8 (1) of the Labor Act) which was included in the decree of December 9th, 1938, and which is alleged to have been violated by the June, 1942, notices, is construed, interpreted and given meaning in the light of the actual practices which had taken place in 1937 and 38, then there was no way for these petitioners to have known what they were restrained from doing thereby, and there is no way in the future for these petitioners to know what they are restrained from doing. The Express Publishing Company decision recognized this situation. It further recognized that the power of the Circuit Court

to punish by contempt alleged violations of the Labor Act was necessarily limited to violations which were related and similar to the violations which it had enforced. Any other interpretation of the Labor Act would face the Circuit Courts with unending contempt actions and would require citizens to operate under a threat of punishment for contempt for acts which they could not know they had been enjoined from doing.

- (5)—THAT PASSAGE OF TIME AND CHANGE IN CONDITIONS MUST BE CONSIDERED IN DETERMINING WHETHER THERE HAS BEEN A CONTEMPT OF COURT:

N. L. R. B. v. Pacific Greyhound, 106 F. (2d) 867 (9th);

City of Campbell v. Arkansas-Missouri Power, 65 F. (2d) 425 (8th);

Cohen v. U. S., 295 Fed. 633 (6th);

Home Investors v. Ioveno, 141 N. E. 78 (Mass.)

- (6)—THAT THERE MUST BE A CONSIDERATION OF THE TOTALITY OF THE EMPLOYER'S ACTIVITIES, RATHER THAN A CONSIDERATION OF ISOLATED UTTERANCES SEPARATED FROM THEIR BACKGROUND, IN ORDER TO SUSTAIN A FINDING OF INTERFERENCE, RESTRAINT AND COERCION UNDER THE LABOR ACT:

N. L. R. B. v. Virginia Electric & Power, 314 U. S. 469.

In the Virginia Electric & Power case this Honorable Court held that the Board's finding as to interference, restraint and coercion could not be sustained because the Board was not shown to have considered the totality of the Company's activities, and because this Court couldn't determine whether the Board had considered the complex of the activities of the Company. This Court refused to hold that the isolated utterances in themselves constituted an interference. And this was an original labor case and not a contempt case. It would seem that in a contempt case the evidence would have to be even more conclusive as to the existence of an actual interference, restraint or coercion. The Circuit Court, in the immediate case, however, far from requiring a showing of interference, restraint and coercion by competent proof of the totality of the Company's activities, held that it was unnecessary to make any proof of interference, restraint or coercion. The Court said that it was sufficient that the notices had the purpose of interfering, etc. The finding of such a purpose was clearly by inference since no facts in the record evidenced such purpose. We submit that the ruling in the immediate case is entirely without precedent and that if a person can be punished for contempt, not because he violated a Court's decree but solely because the Court says he had the purpose of violating the decree, then such person is without any definite criterion as to future conduct.

(7)—THAT INASMUCH AS THE CIRCUIT COURT COULD PUNISH THE CONTEMPTUOUS PAST CONDUCT IN THIS CASE BY A FINE ONLY, IT WAS WITHOUT AUTHORITY TO IMPOSE AS A CONDITION OF PURGE, PERFORMANCE OF ACTS BEYOND ITS POWER TO ASSESS AS PUNISHMENT:

Section 268, Judicial Code, 28 U. S. C. A. 385;
Gompers v. Buck Stove Company, 221 U. S.
 418;

Parker v. U. S., 126 F. (2d) 370;
Nordstrom v. Wahl, 41 F. (2d) 910.

This is a Civil contempt action. The alleged violations had already occurred. No question of continuing violations was before the Circuit Court. It is clear that the only punishment which the Circuit Court can assess in this case is the imposition of a fine commensurate with the expenses incurred by the Labor Board. This being true, did the Court have the power to prescribe conditions under which these petitioners might purge themselves of contempt? And if the Court had such power, could it prescribe conditions which had nothing whatever to do with the contemptuous conduct as found by the Court, and which conditions are beyond what the Court could impose as punishment for the contempt itself? There being no continuing violation of the Court's 1938 decree, was it within the power of the Court to fix, as a condition of purge, that these petitioners give assurance as to their future conduct? The Court not having found that the actions of the foremen were contemptuous, could the Court fix as

a condition of purge that these petitioners advise American's employees that the foremen had been given certain instructions?

(8)—THAT W. J. GOURLEY AND W. H. THOMPSON INDIVIDUALLY WERE NOT GUILTY OF ANY CONTEMPTUOUS ACTS:

Cases in which individual officers or agents of a corporation have been held in contempt of an injunction issued against the corporation itself, were cases where the individual was the alter ego of the corporation or where the individual had engaged in positive conduct contrary to the terms of the injunction. In the case of W. H. Thompson, there is no allegation in the Labor Board's petition showing any positive acts on his part in violation of a decree. Thompson was not an officer of American and was not in charge of its activities. One of the June notices was signed by The Management. The second was signed by Mr. Gourley, and there is no showing as to how the third was signed. Upon what facts the Circuit Court has predicated its finding of guilt as to Thompson individually, we cannot say. The Court's opinion does not show. We only know that if the showing made in this case was sufficient to hold Thompson in contempt, then any agent of American can similarly be held in contempt.

WHEREFORE, petitioners pray that the petition for review on writ of certiorari be granted, and that the recision of the Circuit Court be reversed, and they pray for such other relief as they may be entitled to.

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